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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/783,872	02/20/2004	Thomas R. Bryan	0253-0001	7583
33297	7590	10/19/2006	EXAMINER	
BEEM PATENT LAW FIRM 53 W. JACKSON BLVD., SUITE 1352 CHICAGO, IL 60604-3787			MILLS, DANIEL J	
			ART UNIT	PAPER NUMBER
			3679	

DATE MAILED: 10/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/783,872	Applicant(s) BRYAN, THOMAS R.	
	Examiner Daniel J. Mills	Art Unit 3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 August 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 14 and 15 is/are allowed.
- 6) ☒ Claim(s) 1, 2, 3, 5-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 2/20/2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

In this action it is noted that patent drawings can be relied on to show relative dimensions. In re Hopkins, 342 F.2d 1010, 145 USPQ 140 (CCPA 1965); In re Wolfensperger, 302 F.2d 950, 133 USPQ 140 (CCPA 1962).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 3, and 5-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mishina (US D422,367), in view of Rowan (US 3,484,081).

Regarding claims 1, 11, and 12, Mishina discloses modular fence comprising a plurality of modules each having a plurality of generally parallel elongate members each having an upper end (at A), upper (A) and lower (B) crossbars comprising a continuous, solid, homogeneously formed, and unbroken member, and connecting said plurality of elongate members in a row with a pair of end members (B, joining adjacent modules together) and a plurality of intermediate members (C), wherein said elongate members have a spacing, two pairs of lips (E at both ends of upper and lower crossbars), each pair comprising upper and lower lips, each pair of lips extending outwardly beyond a corresponding one of said pair of end members, each of said pairs of lips providing guides (holes in E as shown in Figure 3) for receiving an elongate stake (B) for connecting each pair of lips to a corresponding pair of lips on another module.

Mishina fails to disclose that elongate members have a spacing of between about 1 inch and about 2.5 inches and that the spacing between the elongate stake and the corresponding end member is not more than about 2.5 inches. However, it would have been an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify the fence as disclosed by Mishina to employ elongate members have a spacing of between about 1 inch and about 2.5 inches, and spacing between the elongate stake and the corresponding end member not more than about 2.5 inches as it would have been obvious that an enclosure with moderate to small spacing between the elongate members would have more successfully contained a baby or animal. This change would have produced no new or unexpected results.

Mishina fails to disclose elongate members extending at least about 16 inches above said lower crossbar, however Mishina states that the enclosure is meant for a baby or animal. It would have been an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify the fence as disclosed by Mishina to include elongate members extending at least about 16 inches above said lower crossbar, as it would have been obvious that a taller enclosure would have more successfully contained a baby or animal. This change would have produced no new or unexpected results.

Mishina fails to disclose a tapered lower end of each elongate member, and that said tapered lower ends of said elongate members extending at least about 3 inches below said lower crossbar for insertion into ground and wherein said elongate stake

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includes a tapered lower end for insertion into said ground below said lower crossbar for insertion into ground

Rowan teaches a tapered lower end of each elongate member, and that said tapered lower ends of said elongate members extending at least about 3 inches below said lower crossbar for insertion into ground and wherein said elongate stake includes a tapered lower end for insertion into said ground below said lower crossbar for insertion into ground (examining the relative distances of figure 5 and reading column 2 lines 21-24 it is clear the elongate members/stakes (11) extend at least about 3 inches below the lower crossbar), for the purpose of allowing the fence to be erected without digging holes (column 1 lines 48-52). Accordingly, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the arrangement of Mishina to include a tapered lower end of each elongate member, and that said tapered lower ends of said elongate members extending at least about 3 inches below said lower crossbar for insertion into ground and wherein said elongate stake includes a tapered lower end for insertion into said ground below said lower crossbar for insertion into ground for the purpose of allowing the fence to be erected without digging holes as taught by Rowan.

Regarding claim 2, Mishina in view of Rowan results in a fence module according to claim 1, wherein said upper crossbar extends across and covers said upper ends of said plurality of elongate members (see Figure 3).

Regarding claim 3, Mishina in view of Rowan results in a fence module wherein the spacing between said elongate members is uniform.

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Regarding claim 5, Mishina in view of Rowan results in a fence module but fails to show that the module is made of aluminum. However, it would have been no more than an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify Mishina in view of Rowan to use modules made of aluminum due to the lightweight of aluminum. This change would have produced no new or unexpected results.

Regarding claim 6, Mishina in view of Rowan results in a fence module wherein said row of elongate members is generally straight.

Regarding claim 7, Mishina in view of Rowan results in a fence module wherein said row of elongate members is curved ("module" can be read to refer to ½ of the enclosure shown for example in Figure 2 at the end of this action – i.e. four sides of the enclosure, this results in a row of elongate members which are curved).

Regarding claim 8, Mishina in view of Rowan results in a fence module wherein said curved row of elongate members forms an arc, but does not specify that this arc is between about 30° and about 90°. However, it would have been no more than an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify Mishina in view of Rowan to arrange the fence elements into modules following an arc between about 30° and about 90° for the purpose of adjusting the size of the enclosure. This change would have produced no new or unexpected results.

Regarding claim 9, Mishina in view of Rowan results in a fence module wherein said curved row of elongate members forms an arc, but does not specify that this arc is

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between about 60°. However, it would have been no more than an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify Mishina in view of Rowan to arrange the fence elements into modules following an arc between about 30° and about 90° for the purpose of adjusting the size of the enclosure. This change would have produced no new or unexpected results.

Regarding claim 10, Mishina in view of Rowan results in a fence module but fails to show that said module is about 2 feet long. However, it would have been no more than an obvious matter of engineering design choice to one with ordinary skill in the art at the time applicant's invention was made, to modify Mishina in view of Rowan to adjust the design of the modules so that each is about 2 feet long, for the purpose of adjusting the size of the enclosure. This change would have produced no new or unexpected results.

Regarding claim 13, Mishina in view of Rowan results in a fence module wherein said spacing between said elongate members and between said elongate stake and said corresponding end member is uniform.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mishina (US D422,367) and Rowan (US 3,484,081) as above, and further in view of Nesic (US 6,360,481).

As to claim 5, Mishina in view of Rowan results in modular fence but fails to disclose that the metal used is aluminum.

Nesic (US 6,360,481) teaches the use of aluminum due to considerations of cost, weight, and durability (column 4 lines 33-35). Accordingly, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to provide Mishina in view of Rowan with aluminum as the material for the fence modules as taught by Nesic so as to provide a fence of low cost and weight as well as high durability.

Response to Arguments

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection.

Allowable Subject Matter

The following is a statement of reasons for the indication of allowable subject matter:

Claims 14 and 15 are allowable for the following reasons:

The prior art specifically Mishina and Rowan, shows a modular fence but fails to show or teach a fence wherein some of said plurality of said modules each include a generally straight row of said elongate members and wherein some of said plurality of said modules each include a curved row of said elongate members in combination with all other limitations.

Conclusion

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Applicant's amendment (claim 1 line 9; claim 12 line 9) necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel J. Mills whose telephone number is 571-272-8115. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on 571-272-7087. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



DJM

10/15/2006



GREGORY J. BINDA
PRIMARY EXAMINER

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